U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 December 2006

CASE NOs. 2005-DCW-00004 and 2006-DCW-00004

In the Matter of:

D.T.,
Claimant,

v.

Verizon Communications, Inc.,
Employer,

Sedgwick Claims Management Services, Inc.,
Carrier.

Appearances: Gordon Reiselt, Esq.
For Claimant

David C. Nolan, Esq., and Daniel R. Lord, Esq.
For Employer and Carrier

Before: Russell D. Pulver
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for compensation brought under the District of Columbia Workmen's Compensation Act of 1928, 36 D.C. Code § 501 *et seq*., an extension of the Longshore Harbor Workers' Compensation Act, as amended ("the Act"). 33 U.S.C. § 901 *et seq*. The Act applies to all claims for injuries or deaths arising from Employment events in the District of Columbia that occurred prior to July 26, 1982.

According to Claimant, on September 13, 2004 he fell down twice, injuring his left shoulder and right knee, when he lost his balance due to dizziness, a symptom of an inner ear condition that stems from an established work related injury that occurred in 1978. He brought this claim against Verizon Communications, Inc. and its insurance carrier, Sedgwick Claims Management Services, Inc. (collectively, "Employer").

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing on February 15, 2006. Pursuant thereto, Notice of Hearing was issued on March 10, 2006, scheduling a formal hearing. On July

11, 2006 the undersigned convened the formal hearing in Albuquerque, New Mexico. The parties had a full and fair opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were admitted into evidence: Administrative Law Judge Exhibits ("AX")1-4; Claimant's Exhibits ("CX") 1-11; and Employer's Exhibits ("EX") 1-4. Testifying on Claimant's behalf were Claimant's medical expert, Dr. Barry Maron, as well as Claimant himself. Employer's medical expert, Dr. Manuel A. Gurule, testified on Employer's behalf.

Both parties submitted post-hearing briefs. Based upon the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Decision and Order.

STIPULATIONS

At the hearing, the parties stipulated to the following:

1. Claimant sustained work related injuries resulting in labyrinthitis in 1978.
2. Claimant continues to receive permanent total disability compensation benefits as well as medical coverage for treatment related to the labyrinthitis.

Hearing Transcript, hereinafter "TR", at 9, 65-66, 108-09.

ISSUES

1. Whether alleged falls and injuries of September 13, 2004 naturally arose from the work related condition of labyrinthitis or are otherwise covered under the Act.

2. What the medical consequences of the alleged falls were, if any.

TR at 9.

FINDINGS OF FACT

Background

Claimant, a 68-year-old man, brought this medical benefits claim against Employer for payment of outstanding medical claims and out of pocket expenses relating to treatment of injuries sustained on September 13, 2004.

The essential, undisputed facts underlying the claim are as follows. On February 5, 1978, Claimant experienced a work related injury while employed as a stationary engineer for a predecessor corporation to Employer. TR at 87. The injury occurred on a work related flight during which Claimant at first felt pressure in his right ear and then severe pain and bleeding in that ear. *Id.* at 89. From this injury Claimant developed labyrinthitis, an inner ear disorder. *Id.* at 65-66, 108-09. Claimant filed a timely claim under the Act for compensation and medical

benefits. An administrative law judge initially found Claimant to be temporarily and totally disabled, and later found him to be permanently and totally disabled, due to the labyrinthitis.

At the hearing, the parties agreed that no dispute exists as to the original diagnosis of Claimant's work related condition of labyrinthitis. *Id.* at 65-66, 108-09. Claimant testified that he continues to experience symptoms of labyrinthitis, including dizziness and vertigo, and that dizziness caused him to fall twice on September 13, 2004, injuring his right knee and left shoulder. *Id.* at 91, 93-96. Employer disputes that the falls occurred as Claimant testified and disputes that the falls are causally related to the work related condition, claiming that the dizziness and vertigo abated altogether sometime prior to the falls in question. *Id.* at 9-10; Employer's Post Hearing Brief at 6.

Claimant testified that since the onset of labyrinthitis in 1978 he has experienced and continues to experience mild dizziness daily, as well as intense episodes of dizziness and vertigo two to three times a week. TR at 89, 190; EX 4 at 4. The episodes last typically a few minutes but can last as long as twenty minutes according to Claimant. TR at 109; EX 4 at 4. He testified that the severity and frequency of the dizziness and vertigo have remained consistent since 1978 but that nausea he previously experienced more intensely has improved over the decades. TR at 109; EX 4 at 4. He takes an anti-dizziness medication, Antivert, which he reports reduces both the dizziness and the nausea. CX 7 at 116; EX 4 at 4. Claimant also testified that in the nearly three decades since the onset of the work related condition of labyrinthitis he has experienced frequent falls due to the dizziness and vertigo associated with that condition, the falls being mostly minor and causing few injuries. TR at 90. He described coping skills he has developed over time to prevent falling. Specifically, he testified that he often can sense when an episode of intense vertigo is about to begin. *Id*. at 109. According to Claimant, when he senses such an episode he often will try to sit down to prevent falling. *Id*.

The details of Claimant's testimony as to the injuries in question are as follows. Claimant testified that on September 13, 2004, he was attending a formal hearing in Washington D.C. regarding a claim related to the original work related injury. *Id*. at 91. He testified that twice on that date he became dizzy and fell, falling for the first time while proceeding down a walkway at the National Mall. *Id*. at 93-94. As he was walking he was overcome by a severe episode of dizziness and vertigo, lost his balance and fell. *Id*. Although he experiences episodes a few times a week, during which he often sits down to prevent falling, in this situation he apparently could not locate a bench or seat and was reluctant to sit down on the Mall walkway. *Id.* at 93-94, 109. Claimant reported that when the dizziness caused him to fall, he hurt his left shoulder and right knee. CX 7 at 111-12. Claimant testified that he experienced some pain in these areas but was able to return to his feet and walk. TR at 94. He did not pursue medical care at that point. Instead, he took a train to a location in Maryland where he was staying in his motor home, which he had driven from his home in Albuquerque to attend the hearing in Washington. *Id.* at 95. Claimant testified the second fall occurred after returning to his motor home. *Id.* at 95-96. He was walking down the motor home steps, became dizzy, lost his balance and fell. *Id*. He reported falling on his left shoulder again but protected his right knee. CX 7 at 112.

Claimant found his left shoulder to be significantly more painful after the second fall and was concerned the injury could be serious, so he sought medical attention. TR at 96; CX 1 at 1;

CX 2 at 7; CX 3 at 8-9. On September 14, 2004, the day after the falls in question, Claimant contacted Employer to report the injuries and obtained a referral to NOVA Urgent Care in Leesburg, Virginia. TR at 96-98. Claimant was seen that same day by Dr. Bao Nguyen, who prescribed pain medication. *Id.* at 96-98, 111-12; CX 1 at 1; EX 1 at 1. Dr. Nguyen diagnosed a left shoulder strain, right knee strain and chronic vertigo. *Id*. Claimant was given a right knee brace and left shoulder sling. *Id.* at 98; CX 1 at 1; EX 1 at 1. He also received a referral from Dr. Nguyen for x-rays at a different location to rule out more serious injuries. TR at 98-99; CX 1 at 1; EX 1 at 1. The x-ray clinic location, in Maryland, was unfamiliar to Claimant; he was concerned about driving and getting lost so he decided to wait for further medical care until he returned home to Albuquerque. TR at 98-99, 113, 116-17, 139. Claimant followed up in Albuquerque with an orthopedic surgeon, Dr. Jeffrie Felter, who saw Claimant on October 7, 2004 and diagnosed a probable rotator cuff injury of the left shoulder and a probable meniscal tear of the right knee. *Id.* at 99; CX 3 at 9. Dr. Felter ordered an MRI of Claimant's right knee and left shoulder. CX 3 at 9.

Subsequently, Carrier denied payment of Claimant's medical claims for treatment of injuries sustained on September 13, 2004. Claimant pursued payment, sending a handwritten letter to Lisa Baxter, a claims examiner for the District of Columbia Department of Employee Services, on October 15, 2004. EX 2; CX 11 at 138. In the letter, Claimant informed Ms. Baxter he became dizzy and fell on September 13, 2004 as he walked along the National Mall walkway toward the Mall itself. EX 2; CX 11 at 138. In his letter, Claimant did not mention the second fall at the motor home, but he described injuries to his right knee and left shoulder and the next-day appointment at Nova Urgent Care, as well as the follow-up appointment with orthopedist Dr. Jeffrie Felter in Albuquerque. EX2; CX 11 at 138. Ms. Baxter corresponded, and informally conferred with, Claimant and Carrier. CX 11 at 143-48. On November 22, 2004, Employer sent a letter formally denying medical claims coverage for the injuries of September 13, 2004, based on "insufficient and wholly conflicting testimonial and medical documentary accounts." CX 11 at 152.

The variation to which Employer referred, and which Employer emphasizes has continued over time, is found among the medical and claims records concerning the details of Claimant's falls on September 13, 2004. When he was pursuing claims payment, Claimant wrote to a District of Columbia claims examiner, Ms. Baxter, with an account that included the first fall but not the second one to which he testified. EX 2; CX 11 at 138. Similarly, some but not all of the medical records in evidence contain an account that includes only one fall, not two. CX 1 at 1**;** EX 1 at 1; CX 3 at 8**;** CX 5 at 17-31. In addition, one medical record notes Claimant fell while walking in from his car to a hotel room, a scenario not found in any other record or testimony. EX 1 at 1; CX 1 at 1. Another medical provider indicated the date of the fall was May 13, 2004 rather than September 13, 2004. CX 4 at 12.

After claims coverage was denied by Employer for the falls and injuries in question, Claimant sought and received treatment from his primary health care provider, Lovelace Sandia Health Systems ("Lovelace"), where his health care is covered by Medicare. TR at 100. Lovelace referred Claimant to physical therapy on two occasions for the injuries to his left shoulder. *Id.*; CX 4 at 13; CX 6 at 80. Shortly after the injuries, Claimant received physical therapy at NovaCare Rehabilitation in Albuquerque from December 2, 2004 to December 17,

2004. CX 4 at 12-14. Claimant testified that from late 2004 until November of 2005, he did not feel a need to seek treatment because although he was unable to carry out all of his daily activities, he decided to try to adjust to the decreased functioning in his left shoulder.[1] TR at 124.

However, Claimant returned to treatment nearly 11 months later, on November 9, 2005. CX 5 at 21. He testified that he did so because his shoulder was increasingly painful, making it difficult to use his left shoulder and arm at all, and causing his shoulder and arm muscles to significantly weaken from lack of use. TR at 124; CX 5 at 21, 31. His treating providers noted Claimant's left shoulder problems included complaints of pain, diminished range of motion, and an inability to lift the left arm over the head. *Id.* Claimant was prescribed etodolac, a nonsteroidal anti-inflammatory medication, and was referred to physical therapy to decrease pain and increase range of motion. CX 5 at 21; CX 6 at 80-102. He was referred to diagnostic imaging tests. He also was referred to physical therapy which he attended at Lovelace Rehabilitation Outpatient Services in Albuquerque from January 12, 2006 to March 14, 2006. *Id.*

Upon returning to treatment, Claimant received the following diagnostic imaging tests. He received an MRI of his left shoulder on November 12, 2005. CX 5 at 24. The MRI report by radiologist Dr. Jesse R. Rael noted advanced osteoarthritic degenerative changes of the cartilage of the left shoulder as well as a suggestion of tendinosis (tendon degeneration), and possible tears to the cartilage. *Id.* at 23-24. On December 6, 2005, Claimant received an arthrogram, which involves an imaging procedure where fluid is injected into the joint to view its mechanisms. *Id.* at 27-28. According to the arthrogram report, there was no evidence of a rotator cuff tendon tear. *Id.* at 28. Claimant also received x-rays of his left shoulder on December 13, 2005 and an MRI of his right knee on May 20, 2006. *Id.* at 37. Dr. Kiernan Morrow read the images, reporting cysts in the shoulder joint and reactive changes involving the acromioclavicular joint (near the rotator cuff), but no calcification of the rotator cuff. *Id.* at 33-34. He reported degenerative changes in the knee but no internal derangement was seen. *Id.* at 37.

In the time since discharge from physical therapy in March of 2006, Claimant has followed up at home with a program of exercise and ibuprofen. TR at 122-23, 131, 133, 138; CX 6 at 102. Claimant's medical providers have not ruled out more invasive treatment. Claimant's orthopedist Dr. Damen Sacoman reviewed the x-ray and MRI results and stated shoulder replacement or arthroscopic surgery may be necessary at some point. CX 5 at 31, 36.

At the hearing, Claimant testified he continues to have pain in his left shoulder with a limited range of motion and he cannot lift his left arm above shoulder height. TR at 102. Claimant reported that he takes ibuprofen for the pain in his left shoulder and right knee but it does not fully eliminate the shoulder pain which he reports is constant. EX 4 at 4. Claimant also stated he tries to keep active, engaging in volleyball and sculpting; he reportedly takes a slow

[1] Claimant testified he was involved in a motor vehicle accident in July 2005. TR at 126. He was brought to the hospital by emergency services, strapped to a backboard from which he removed himself after it had pained his left shoulder for an hour and a half while he awaited medical attention. *Id.* at 126-28, 136. Claimant expressed the belief that his right knee was injured in the accident and his left shoulder was injured when he wriggled out of the backboard, but he did not seek medical treatment; instead he left the emergency room. *Id.* at 127.

pace, avoids "head-down" positions, and sits down when he senses the onset of an episode of dizziness. TR at 109, 121-23; CX 4 at 12; CX 5 at 80; CX 7 at 116.

Claimant reported the total amount of outstanding claims for medical treatment of the injuries in question is $8,196.46, and estimated his out-of-pocket expenses have been greater than $1,000 but probably less than $2,000.00. TR at 104; CX 8.

Summary of Medical Examinations

Claimant submitted into evidence a report from an Independent Medical Examination ("IME") completed by orthopedist Barry Maron, M.D. CX 7. Employer submitted into evidence a report from an IME completed by neurologist Manuel A. Gurule, M.D. EX 4. Dr. Maron and Dr. Gurule both testified at the hearing.

Dr. Barry Maron

Claimant was seen for a medical evaluation by Dr. Maron, a board-certified orthopedic surgeon, on May 3, 2006. CX 7 at 1. The written report and testimony of Claimant's medical expert Dr. Maron were admitted over Employer's objection at the hearing. TR 12-13, 28-40, 197. Dr. Maron examined Claimant, conducted physical tests of Claimant's balancing abilities, and reviewed the medical records from treating providers as well as the following diagnostic imaging tests: the arthrogram; MRI images of the right knee and left shoulder; and an x-ray from 2003 of the left shoulder prior to the falls and injuries in question. *Id.* at 41, 42, 52-53; CX 7 at 122.

Claimant was cautious about maintaining balance, according to Dr. Maron, who observed Claimant placing his hands against the wall or table while standing. *Id.* at 118. He found Claimant's response to the Rhomberg test (of balancing abilities conducted while the patient stands with eyes closed, feet together) to be "very positive," resulting in immediate vertigo. *Id.* Dr. Maron noted pain and tenderness in the left shoulder area, as well as muscle atrophy. TR at 48-51; CX 7 at 119-20. He noted Claimant has a decreased range of motion of the left shoulder, reports pain and clicking with some movements, and reports pain upon lifting the left arm TR 48-49, 120; CX 7 at 119-21. Dr. Maron testified that the left shoulder has weak internal rotators as compared to the right shoulder, but that Claimant's responses to shoulder strength tests were good, because scarring stabilized the joint and physical therapy maximized possible shoulder strength. TR at 49, 71, 77-78; CX 7 at 120.

Dr. Maron concluded that Claimant's injuries from September 13, 2004 are the result of falling due to chronic dizziness and vertigo, noting these symptoms stem from Claimant's long-established labyrinthitis. TR at 54-57; CX 7 at 111, 115, 116, 118, 122. Dr. Maron diagnosed Claimant's left shoulder pain and dysfunction as follows: a tear to the rotator cuff (i.e., a tear to the supporting and strengthening structure of the shoulder joint); joint loss, which Dr. Maron attributes to advanced post-traumatic osteoarthritis; tendinosis with a probable tear; and acromioclavicular joint impingment (friction between the rotator cuff and the bony knob located above it). TR at 52, 69-70; CX 7 at 114-15, 121. He diagnosed Claimant's right knee problems as both a resolving sprain and right knee patello-femoral chrondromalacia (damage to the knee

joint). *Id.* at 121-22; TR at 68. Although Dr. Maron did not find the right knee to be currently symptomatic (TR at 68), he noted that the knee damage is permanent and the patello-femoral pathology will exacerbate over time. CX 7 at 122.

According to his testimony, Dr. Maron diagnosed the left rotator cuff injury based on his exam of Claimant and on the differences between an x-ray of Claimant's left shoulder in 2003 before the falls in question, which was normal, and the MRI which was completed after the falls; he testified that the MRI results indicated changes in the left shoulder joint that he attributes to the falls. TR at 52-53; 75-78; CX 5 at 31-34. Dr. Maron predicted that the left shoulder will require surgery and that Claimant will need additional psychiatric treatment if the shoulder problems exacerbate Claimant's bipolar disorder. CX 7 at 122. At the hearing, Dr. Maron testified that after he had issued his report diagnosing Claimant with a left rotator cuff injury he received and reviewed the arthrogram which rules out the rotator cuff injury. TR at 75-77; CX 5 at 27-28. Based on the physical examination, he stated he finds Claimant does have a rotator cuff injury and believes that scarring from the injury precluded its detection via the arthrogram because it prevented the spread of the dye. TR at 76-78; CX 5 at 27-28. Dr. Maron explained that the physical examination reflected this; he found that the left shoulder joint had stabilized due to scarring, and the left shoulder and arm had been strengthened due to physical therapy. TR at 78. He stated that as a result Claimant had regained the ability to lift the left arm against resistance. *Id.*

Dr. Manuel A. Gurule

Claimant was seen for a medical evaluation by Dr. Gurule, a board-certified neurologist, on June 29, 2006. EX 4 at 1. Prior to his examination of Claimant, Dr. Gurule had not performed an independent medical examination involving vertigo. TR at 163; 183-84. Dr. Gurule interviewed Claimant, reviewed limited medical records, conducted a physical exam and tests of Claimant's balancing abilities, and neurological testing.[2] *Id.* at 145-46, 161, 169-73; EX 4 at 6.

Dr. Gurule limited the conclusions in his testimony and his written report to neurological problems only, not vestibular (inner ear) problems or other medical concerns. TR at 156-58, 194; EX 4 at 6. He admitted that if a patient were to come to him with vertigo and dizziness, he would rule out neurological disorders (such as multiple sclerosis, brain lesion, brain tumor, demyelinating disease) and then refer the patient to a doctor with an inner-ear specialty, either a neurologist or an ear, nose and throat specialist (an otorhinolaryngologist). TR at 194.

Claimant reported to Dr. Gurule that he experiences mild ongoing dizziness throughout his day and more intense symptoms in the form of intermittent episodes that occur two to three times a week on average, tending to last five to twenty minutes each. EX 4 at 4. Dr. Gurule found Claimant's regular gait to be normal upon examination but testified that Claimant had difficulty with a tandem (heel-to-toe) gait, and during Rhomberg testing Claimant lost his balance, starting to fall backwards. TR at 154-55, 189. Dr. Gurule also performed Brainstem Auditory Evoked Responses ("BAER") testing, which measures brain wave responses to clicking

[2] Due to receiving incomplete medical records, Dr. Gurule reviewed only two records from Claimant's treating neurologist of 15 years, from 1994 and 1997. TR at 169.

sounds to determine the auditory pathway functioning of the brainstem. *Id.* at 155-56, 178-79. Because the results of this test were normal, Dr. Gurule found no evidence of a lesion affecting the eighth cranial nerve or lateral brainstem and thus concluded he could find no neurological etiology for the reported dizziness and vertigo. *Id.* at 156; EX 4 at 5.

Upon cross examination, Dr. Gurule admitted that while the BAER test could identify balance disorder dysfunction involving the vestibular-cochlear nerve, it did not test for other types of vestibular dysfunction. TR at 188. Dr. Gurule also admitted that the results of the BAER test could vary over time, so that a normal result from the test performed on Claimant on July 29, 2006 would not necessarily indicate that the same test would yield normal results at another time. *Id.* 175, 183. Similarly, Dr. Gurule conceded that the other tests he conducted for vertigo, the tandem gait and Rhomberg tests, only detect vertigo at the moment of testing. *Id.* 189-90. Moreover, Dr. Gurule admitted that Claimant's vertigo is intermittent in nature, if Claimant's subjective report is to be believed, and also admitted he found no reason to question the truthfulness of Claimant's subjective reporting. *Id.* at 180, 189-90. Dr. Gurule did not conduct, and has never conducted, electronystagmography (ENG), a recording of eye movements to evaluate the causes of vertigo, imbalance or dizziness. He did not disagree that the ENG is considered by the American Academy of Neurology to be the gold-standard test for vestibular functioning, and responded that this is the type of test that would be utilized by someone who is an inner-ear specialist, which he does not profess to be. *Id.* at 183-84, 191, 194.

Dr. Gurule testified that he found no neurological evidence of labyrinthitis, no neurological etiology for the vertigo, and could find no evidence of any etiology for the vertigo. *Id.* at 156-58, 190, 192; EX 4 at 6. He found no need for treatment from a neurological standpoint, and concluded that neurological dysfunction did not cause Claimant's falls. TR at 156-58, 190; EX 4 at 6. Dr. Gurule concluded that Claimant's reported dizziness and falls are unrelated to any neurological condition or to Claimant's work related condition. TR at 157-158.

CONCLUSIONS OF LAW

The Act is construed liberally in favor of injured employees. *Voris v. Eikel*, 346 U.S. 328, 333 (1953); *Stevenson v. Linens of the Week*, 688 F.2d 93, 98 (D.C. Cir.1982). However, the United States Supreme Court has determined that the true-doubt rule, which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3d Cir. 1993). In arriving at a decision in this matter, it is well settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners or other expert witness. *Banks v. Chicago Grain Trimmers Ass'n, Inc.,* 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968); *Avondale Shipyards, Inc. v. Kennel,* 914 F.2d 88, 91 (5th Cir. 1988); *Atlantic Marine, Inc. and Hartford Accident & Indem. Co. v. Bruce,* 551 F.2d 898, 900 (5th Cir. 1981); *Duhagon v. Metropolitan Stevedore Co.*, 31 BRBS 98, 101 (1997).

Causation

Section 20(a) of the Act creates an initial, rebuttable presumption that a claimant's disabling condition is causally related to his employment. 33 U.S.C. §920(a); *Am. Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 64 (2d Cir. 2001). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and the harm but must present some evidence that tends to establish that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which caused or could have caused the harm or pain. *Am. Stevedoring*, 248 F.3d at 64-65; *Brown v. I.T.T./Cont'l Baking Co*., 921 F.2d 289, 296 n.6 (D.C. Cir. 1990); *Hargrove v. Strachan Shipping Co.,* 32 BRBS 11 (1998). To invoke the Section 20(a) presumption as to a subsequent injury, a claimant must provide evidence that tends to show the injury occurred and that the injury could be the natural or unavoidable result of the original work related injury. *See Hargrove v. Strachan Shipping Co.*, 32 BRBS 11 (1998). A claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp*., 14 BRBS 234, 236 (1981), aff'd sub nom. *Sylvester v. Director, OWCP*, 681 F.2d 359, 14 BRBS 984(CRT) (5th Cir. 1982). The sequence of events surrounding an injury can in some cases provide a much better understanding of a case than the medical evidence. *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981).

Employer's liability for Claimant's original work related condition, labyrinthitis, is already established. TR 65-66, 108-09. In dispute is whether the injuries of September 13, 2004 are covered under the Act. For the following reasons, I find Claimant's evidence meets the *prima facie* requirements. Claimant's testimony, the sequence of events and the medical evidence tend to establish that an injury occurred on September 13, 2004 that was the natural result of Claimant's work related labyrinthitis.

Over a period of nearly three decades since the onset of the work related condition, Claimant has experienced intermittent episodes of dizziness and vertigo which cause him to frequently fall. *Id.* at 89-90, 109, 190; EX 7 at 111, 116, 118; EX 4 at 4. Claimant developed coping skills over time to manage symptoms of dizziness and vertigo and minimize injury. TR at 109. For example, when Claimant feels an episode coming on, he often will sit down to avoid falling down. *Id.* Claimant testified that on September 13, 2004, he was walking at the National Mall in Washington D.C. when he experienced a severe episode of dizziness, lost his balance and fell. *Id.* 91-94. Claimant testified that later, after returning to his motor home where he parked it for the evening, he was again overcome by dizziness, lost his balance and fell while descending the steps of the motor home. *Id.* at 95-86; CX 7 at 112.

This sequence of events tends to establish Claimant's injuries are due to episodes caused by the work related labyrinthitis. The dizziness episodes Claimant reported experiencing on September 13, 2004 appear to be the just like the countless episodes that preceded them over the 28-year period since the work related labyrinthitis began. TR at 89, 109-10, 190; EX 4 at 4. Just

prior to each fall, Claimant became dizzy, and then fell after he found himself in a location where he could not easily sit down to regain balance: the first episode occurred as he proceeded down a Mall walkway, and the second happened when he lost his balance walking down some stairs. TR at 93-96. The fact that Claimant was not able to sit down easily indicates why he experienced more serious injuries than he usually does. *Id*. at 93, 96, 109. I find Claimant's demeanor to be sincere and his accounting of these events credible. Thus I find evidence of the circumstances surrounding the injuries, including Claimant's testimony as to the sequence of events, tends to establish that the work related condition caused Claimant's falls and injuries on September 13, 2004.

Claimant's medical evidence also supports this causal connection. Claimant's medical records indicate a longtime history of chronic vertigo and dizziness. CX 1 at 1, 2; CX 3 at 1; CX 5 at 21. In October 2005, Claimant's nurse practitioner, Marilyn Newby, reported Claimant had no pain in his left shoulder prior to the falls in question and had consistently experienced left shoulder pain since the time of the falls on September 13, 2004. EX 5 at 21. In addition, a report from x-rays taken one year prior to the injuries in question indicated Claimant's left shoulder at that point had no injuries. TR at 52-53. Dr. Maron, Claimant's medical expert, compared that x-ray with an MRI that took place after the falls in question that showed injuries to the left shoulder joint, and concluded the falls caused a left rotator cuff tear and related injuries. *Id.* at 48-56, 69-70; EX 5 at 31-34; CX 7 at 120-22. Dr. Maron testified that Claimant suffers from chronic dizziness and vertigo, long established as labyrinthitis, and concluded those symptoms caused Claimant's falls and injuries. TR at 54-57; CX 7 at 111, 115, 116, 118.

Employer argues that the issue of whether the falls on September 13, 2004 are related to the work related condition of labyrinthitis is a complicated medical question that must hinge on expert testimony, that Dr. Maron's testimony should have been excluded, and that in any event it is unreliable. Employer's Post-hearing Brief at 11. Employer argues that Dr. Maron's opinion should be accorded little weight for the same reasons Employer argued Dr. Maron's opinion should have been excluded. Employer claims that Dr. Maron lacks expertise to testify as to causation, that Dr. Maron fails to base his opinion on the facts in evidence, and that Dr. Maron's opinion should be excluded because of his history of bipolar disorder.[3]

I find Employer's contentions to be groundless. As to expertise, Dr. Maron is an orthopedist whose practice includes treating injuries incurred by persons with labyrinthitis. TR at 65. His opinion as to whether Claimant still has symptoms of labyrinthitis is salient as to the issue of whether Claimant could have fallen due to those symptoms. Dr. Maron is a physician and as such can offer his opinion as to Claimant's symptoms and diagnosis; he need not be an inner ear specialist in labyrinthitis.[4]

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[3] Employer cited Dr. Maron's history of bipolar disorder to support its objection to the admission of Dr. Maron's testimony and written report. To the extent that Employer also argues that such a history renders Dr. Maron's opinion unreliable, I find Employer fails to support such a claim. Dr. Maron's functioning in 2003 does not bear on his recent functioning, which apparently has been well-maintained. TR 39-40. Dr. Maron's license is restricted as to surgical practice due to his bipolar disorder, but he has practiced in an outpatient setting in Albuquerque for nearly three decades. *Id.* at 40.

[4] Similarly, Employer's medical expert Dr. Gurule is not an inner ear specialist. TR at 163, 183-84, 194.

Employer also argues Dr. Maron's opinion is unreliable because his diagnosis of Claimant's left shoulder joint pain and dysfunction differs from that of the arthrogram radiologist, and because Dr. Maron did not address in his written report possible effects of a motor vehicle accident, which occurred on July 8, 2005 when Claimant's car was rear-ended. *Id.* at 126. Yet Employer does not argue that the motor vehicle accident was an intervening event. The potential impact of that accident on the injuries in question does not bear on Dr. Maron's opinion regarding whether Claimant's falls and the resulting injuries that were well-documented prior to the July 2005 accident could have been caused by the established work related condition.

Equally insubstantial is Employer's claim that because the written report interpreting the arthrogram rules out a rotator cuff injury, this somehow renders unreliable Dr. Maron's opinion to the contrary. Medical opinions can and do vary, as here where a reasonable difference of opinion exists as to whether scar tissue may have impacted the arthrogram results. *Id.* at 75-78, 81-82; CX 5 at 27-28. Thus I find Employer's argument that Dr. Maron's opinions are unsupported by the facts is entirely without merit.

As for Employer's claim that determination of causation in this case is a complicated medical question that hinges on expert testimony, it is Employer who complicates the issue, citing unrelated compensation cases that do not arise under the Act. *See* Employer's Post-Hearing Brief at 11-13. Moreover, the determination of this case need not hinge on expert testimony, because the parties stipulated to Claimant's work related condition of labyrinthitis, and because Claimant's treating providers have noted Claimant's dizziness and vertigo, prescribe medication for dizziness, and have treated Claimant's injuries from falling on September 13, 2004. TR at 65-66, 108-09; CX 1 at 1; EX 1 at 1; CX 3 at 8-9; CX 4 at 12-13, 14-15; CX 5 at 17-28, 31-38; CX 6 at 79-102; CX 7 at 116; EX 4 at 4. In addition, I find Claimant's testimony credible that he continues to experience dizziness and that this caused him to lose his balance and fall twice on September 13, 2004. His account of the events in question is consistent with the extensive, documented history of dizziness episodes caused by his work related condition. None of the evidence indicates such episodes have abated at any point since the original injury and diagnosis of labyrinthitis in 1978. My observations of Claimant's demeanor, the content of his testimony, and his subjective report to medical providers of his injuries tend to establish that Claimant suffered injuries from the falls and that these injuries were the natural result of his original work related condition of labyrinthitis.

Employer argues, however, that Claimant's credibility is lacking because of inconsistencies in his account of the two falls on September 13, 2004. Employer does not claim that there are inconsistencies in Claimant's testimony. Rather, Employer emphasizes that when the medical claims at issue were denied, Claimant wrote to a District of Columbia claims examiner, Ms. Baxter, with an account that included the first fall but not the second one. EX 2; CX 11 at 138. Similarly, some but not all of the medical records in evidence contain an account that includes only one fall, not two as Claimant testified. CX 1 at 1**;** EX 1 at 1; CX 3 at 8**;** CX 5 at 17-31. One medical record noted the location of the falls to be in between his car and a hotel room. EX 1 at 1; CX 1 at 1. Another medical provider indicated the date of the fall was May 13, 2004 rather than September 13, 2004. CX 4 at 12.

Employer seems to be arguing that the existence of minor variations in medical histories, written by Claimant's treating providers over the course of nearly two years, indicates that the falls did not occur as Claimant testified. Employer's Post-Hearing Brief at 6-7. This argument fails to account for the possibility that Claimant's treating providers may have made some recording errors concerning the account Claimant provided. It is significant that most of the records Employer cites include only a few sentences of patient history, simply noting that Claimant experienced a fall before specifying, in detail, the resulting injuries. EX 1 at 1; CX 1 at 1; CX 3 at 8; EX 4 at 12; CX 5 at 19, 21, 31. Conversely, one medical record that contains extensive detail about the events surrounding Claimant's injuries includes an account of both of Claimant's falls that is consistent with Claimant's testimony. CX 6 at 80. In addition, some of the records particularly suggest provider error. One provider, for example, noted the injuries occurred on May 13, 2004 rather than September 13, 2004. CX 4 at 12. A single error in the month that one provider recorded, combined with the fact that the date and year remained accurate, calls into question not Claimant's credibility but the provider's accuracy in recording. Similarly, in another instance Claimant apparently had difficulty communicating with a physician due to a language barrier which may have contributed to errors in the medical history. TR at 111; CX 1 at 1; EX 1 at 1. The provider wrote that Claimant fell once and also noted Claimant was staying at a hotel room and that the fall occurred while walking from the car to his room. CX 1 at 1; EX 1 at 1. This scenario departs entirely from any other account in evidence of the events in question.

Even if Claimant is responsible for some of the minor variations in the medical records, this alone would not lead me to conclude that Claimant's account of the events lacks credibility. I find the discrepancies in the record are insignificant and within a range of variation that is to be expected over the course of nearly two years. *See Harrison v. Todd Pacific Shipyards Corp*., 21 BRBS 339, 2 (1988) (a claimant's testimony may be found credible notwithstanding variation among claimant's accounts of events at issue, if the variation is within an expected range or insignificant).

When Claimant sought medical treatment for his injuries, he was in pain and at some points on pain medication, the latter of which alone, according to Dr. Maron, could be responsible for errors or omissions in Claimant's account of the incidents surrounding his injuries. CX 7 at112. Similarly, although Employer emphasizes that Claimant wrote the D.C. claims examiner, Ms. Baxter, with an account of his injuries that included only the first fall at the Mall, it is significant to note this letter is partially written in incomplete sentences, shortly after the injuries in question, and at a time when Claimant was in pain and taking pain medication. CX 1 at 1; EX 1 at 1; CX 7 at 112. Thus it appears Claimant unintentionally omitted the second fall of September 13, 2004 as he wrote the examiner while on pain medication and under a sense of urgency to get his medical claims paid. My observations at the hearing further support this conclusion. Based on my observations of Claimant and the consistency of his testimony, I find Claimant to be a credible witness. Nothing in his testimony was inherently inconsistent, nor do I find any meaningful inconsistencies in the letter to Ms. Baxter or the medical records of Claimant's treating providers.

Employer also raises an unrelated matter, in which Claimant requested one of his treating providers to write a letter to assist him in contesting a seat belt violation. Apparently, Employer

is expressing the belief that, in requesting such a letter, Claimant somehow demonstrated a tendency to manipulate the truth. Employer's Post-Hearing Brief at 8. Employer fails to support this belief. No evidence indicates Claimant was less than truthful with his treating provider when he asked him to write the letter. TR at 63, 134; EX 3. Thus this matter indicates nothing about Claimant's credibility or about the matters at issue for determination in this case.

Equally uncorroborated is Employer's assertion that Claimant has not been receiving ongoing treatment "from a neurologist or another provider for any ongoing labyrinthitis," a statement that is apparently meant to bolster Employer's argument that Claimant ceased experiencing labyrinthitis symptoms some time prior to the alleged falls of September 13, 2004. Employer's Post Hearing Brief at 11. However, even Employer's medical expert, Dr. Gurule, noted that Claimant is being treated for dizziness and vertigo with the anti-dizziness medication, Antivert. EX 4 at 4; CX 7 at 116.

For the foregoing reasons, I find that the evidence tends to show Claimant's falls and injuries on September 13, 2004 were the natural result of the work related condition of labyrinthitis. Therefore, Claimant's evidence invokes the Section 20(a) presumption, linking Claimant's injuries of September 13, 2004 to the work related condition.

An employer may rebut the Section 20(a) presumption with substantive evidence that severs the presumed causal connection between the injury and Claimant's employment. *Am. Stevedoring Ltd.*, 248 F.3d at 65. An employer may do so with "specific and comprehensive" evidence sufficient to sever the connection between the injury and the employment in which case the presumption falls away and causation is addressed considering the evidence as a whole. *Swinton v. J. Frank Kelly, Inc*., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). In that event, all relevant evidence is weighed to determine if a causal relationship has been established, with the claimant bearing the ultimate burden of persuasion by a preponderance of the evidence. *Id.*; *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 280, 28 BRBS 43(CRT) (1994).

Employer argues that the opinion of its expert, Dr. Gurule, constitutes substantial evidence that breaks the causal nexus by establishing that Claimant no longer experiences symptoms of the work related condition of labyrinthitis. In its attempt to break the causal nexus, Employer tries to prove a negative and so takes on a very difficult rebuttal burden. *See Gunter v. Parsons Corp*., 6 BRBS 607 (1977), aff'd sub nom. *Parsons Corp. v. Director, OWCP*, 619 F.2d 38, 12 BRBS 234 (9th Cir. 1980). Employer argues that the falls of September 13, 2004 could not have been caused by dizziness and vertigo because such symptoms abated at some point, thus contending Claimant has been fabricating his symptoms since this theoretical abatement began. Employer's Post-Hearing Brief at 10. However, I find this theory to be entirely unsupported. Employer stipulated to the work related condition of labyrinthitis. TR 65-66, 108-09. The established existence of such a condition would strongly imply the existence of symptoms associated with the condition, particularly here where a history of those very symptoms led to the diagnosis of the established condition, and the treating providers note the ongoing nature of these symptoms, prescribing Antivert for chronic dizziness. *Id.* at 169-71; CX 1 at 1, 2; CX 3 at 1; EX 4 at 4; CX 7 at 116.

Employer's speculative hypothesis is not supported by medical evidence provided by its medical expert, Dr. Gurule. TR 141-95; EX 4. Contrary to Employer's theory of symptom fabrication, Dr. Gurule testified he has no reason to believe Claimant was untruthful with him and that Claimant reported he experiences intermittent vertigo episodes. TR at 180, 190; EX 4 at 4. Dr. Gurule testified that he found no neurological evidence of labyrinthitis, no neurological etiology for the vertigo, and no evidence of the etiology of the vertigo. TR at 156-58, 190, 192; EX 4 at 6. He found no need for treatment from a neurological standpoint, and concluded that neurological dysfunction did not cause Claimant's falls. TR at 156-58, 190; EX 4 at 6. Dr. Gurule concluded that Claimant's reported dizziness and falls are unrelated to any neurological condition or to Claimant's work related condition. TR at 157-158.

I accord little weight to Dr. Gurule's opinions due to his relative lack of experience in dealing with labyrinthitis and inner ear disorders generally. Dr. Gurule repeatedly limited his opinion to neurological problems, testifying he could not identify any neurological etiology for the vertigo or neurological evidence of labyrinthitis, and that neurological dysfunction did not cause the falls. *Id.* at 156-58, 190; EX 4 at 6. His opinion was even further limited by his background and experience. He has never completed an IME for vertigo or dizziness, and if a patient were to ask him to diagnose dizziness and vertigo he would limit himself to ruling out neurological causes (i.e., a brain tumor, stroke, multiple sclerosis, a brain stem lesion or demyelinating disease). TR 163, 183-84, 194. He testified that once these were ruled out, he would refer such a patient to an inner ear specialist. *Id.* at 194.

Dr. Gurule testified that Claimant has intermittent vertigo if Claimant's subjective report is to be believed, and admitted that he has no reason to disbelieve Claimant. *Id.* at 189-90. The only tests detecting dizziness and vertigo that Dr. Gurule conducted were entirely inappropriate for a patient reporting intermittent vertigo, because the tests only detected vertigo at the moment of testing. *Id.* 189-90. Most significantly, Dr. Gurule did not conduct the gold-standard test that he admitted is utilized by inner ear specialists, and so he failed to provide any evidence that Claimant's dizziness and vertigo have abated. *Id.* at 173, 175, 183-84, 189-90. Thus I find that Dr. Gurule provided no relevant medical data as to whether Claimant's symptoms may have abated, and utterly failed to provide reliable evidence to support his conclusion that the dizziness and falls in question are unrelated to the work related labyrinthitis. *Id.* at 157-58. I therefore reject in full Dr. Gurule's unsupported opinions as to whether Claimant still experiences dizziness and vertigo symptoms and whether such symptoms caused or could have caused Claimant's falls on September 13, 2004.

Employer attempts to support its speculative theory of symptom abatement by emphasizing that a person with dizziness and vertigo would not engage in the kinds of activities in which Claimant engages, including driving, volleyball, and sculpting. However, the evidence concerning Claimant's daily activities does not indicate that he experiences a symptom-free existence but rather reflects that he has learned to adjust to the dizziness and vertigo while trying to remain active. Claimant apparently tends to avoid "head-down" activities to minimize the risk of falling and hitting his head. CX 7 at 116. When he senses the onset of an episode, he tries to sit down quickly to avoid falling. TR at 109. All three of the activities named by Employer require only upright positions, and two of the three may be engaged in while sitting (driving, sculpting). In addition, it appears Claimant compensates for his symptoms while engaging in

these activities. He tries to avoid driving on long trips, and when he does take a long trip, he stops every two hours for a rest. CX 7 at 116. For example, when Claimant drove home from Washington, D.C. from Albuquerque, he took six days to do so, indicating he drove four to five hours a day on average. TR at 117. As for volleyball, which Claimant plays one to two times a week, the pace of the game is apparently very leisurely. TR 121-23. Thus I find that Employer merely speculates that Claimant's dizziness and vertigo have abated and provides no evidence, medical or otherwise, to the contrary.

For the foregoing reasons, I find that Employer fails to provide substantial evidence, or any evidence, that severs the causal connection between the injuries Claimant experienced and the work related condition of labyrinthitis. Accordingly, I find the Act applies to the injuries Claimant experienced from the falls on September 13, 2004.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and on the entire record, I issue the following compensation order. The specific dollar computations may be administratively calculated by the District Director.

It is therefore **ORDERED:**

1. Pursuant to Section 7 of the Act, Employer shall pay all outstanding medical claims and costs, and all out-of-pocket expenses, related to Claimant's injuries from September 13, 2004 and shall furnish all future reasonable and necessary medical treatment of the injuries.

2. Employer shall pay interest on Claimant's out-of-pocket expenses from the date incurred until the date of actual payment at the rate prescribed under the provisions of 28 U.S.C. § 1961.

3. The District Director shall make all calculations necessary to carry out this Order.

IT IS SO ORDERED.

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Russell D. Pulver
Administrative Law Judge